United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1467

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In The

United States Court of Appeals

For The Second Circuit

SALVATORE MANGIAMELLI,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

APPELLANT'S BRIEF

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SALVATORE MANGIAMELLI,

Petitioner-Appellant,

-against-

THE UNITED STATES OF AMERICA,

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- -x

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

The appellant Salvatore Mangiamelli[1] appeals the February 26th, 1974, denial of his application pursuant to 28 U.S.C. § 2255, for the vacatur of the Judgment of Conviction entered against him on November 20th, 1972, (Honorable Edmund L. Palmieri, D.C.J.) after conviction by a verdict of a trial jury for the crime of Conspiracy to Commit Interstate Theft in violation of 18 U.S.C. §§ 2314 and 2315 (Transport and Sell Stolen

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1 Hereinafter referred to as "Mangiamelli".

Securities). The judgment was imposed for a term of five (5) years and a committed fine of $10,000.00.

Mangiamelli is presently under service of that sentence.

STATEMENTS OF THE CASE AND FACTS

(a) The Case

Indictment 71 Cr. 1006, filed September 2nd, 1971, in the Southern District of New York, charged Mangiamelli, and co-defendants Melvin Allen Kronn and Gennaro Ciprio in One Count with Conspiracy to Transport and Sell Stolen Securities, valued in excess of $5,000.00, in interstate commerce in violation of Title 18 U.S.C., Section 371.

On November 4th, 1971, a superseding indictment was filed, in Nine Counts, in the Northern District of Illinois charging Kronn, Ciprio and others with dealing in stolen securities moving in interstate commerce. The Government consented on November 18th, 1971, to sever Ciprio from the indictment filed in the District Court for the Southern District of New York. Ciprio was murdered in April, 1972, some five months

prior to trial. Kronn and Norman Reese entered pleas of guilty to all counts in the Illinois indictment and were sentenced before testifying as Government witnesses at this trial.

Trial commenced on September 6th, 1972. On September 11th, 1972, the jury found Mangiamelli guilty. On November 20th, 1972, Judge Palmieri sentenced defendant to a term of imprisonment of five years and imposed a $10,000.00 fine, at the same time bail pending appeal was denied by the Court. On December 5th, 1972, the Court of Appeals also denied bail.

On March 1st, 1973, the Second Circuit unanimously affirmed the conviction United States v. Mangiamelli, 472 F.2d 1404 (2nd Cir. 1973). On June 11th, 1973, the Supreme Court of the United States denied certiorari Mangiamelli v. United States, 412 U.S. 939 (1973). Thereafter, Mangiamelli collaterally attacked the Judgment of Conviction pursuant to a 28 U.S.C. § 2255 application. The motion for Vacatur of the Conviction was denied

resulting in the instant appeal. (A. 2a)[2]

(b) The Facts

After Mangiamelli applied for a severance to enable him to call Gennaro Ciprio as a defense witness (T. 10a-11a), the Government consented on the sole ground that since the co-defendant Ciprio and Melvin Allen Kronn had been indicted with nine others on November 4th, 1971, in a Federal Court in Illinois on a charge of Conspiracy to Receive and Transport Stolen Securities in Interstate Commerce, and on substantive counts of Receiving and Selling the Stolen Securities, "The Government does not intend at this time, to proceed against these defendants in this district on its indictment." (T. 20a)

Following the severance and just prior to the selection of the jury on September 6th, 1972, Mangiamelli's counsel informed the Court that, "in the meantime, Ciprio

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2 References to the trial record will be indicated in parenthesis followed by the letter "T." and pagination, thusly, "(T..a)." References to Mangiamelli's Appendix will be cited in parenthesis, the pagination preceeded by letter "A" and followed by a small letter "a"; thusly, "(A..a)."

has been shot and is dead and is not available as a witness." (T. 28a)

The Government stated to the Court that "there was some publicity about Ciprio when he got killed, I think there was a television program about Ciprio." (T. 29a) To avoid any possible prejudice to defendant, the Court thereupon questioned the jurors, "whether any of you have been exposed to any publicity affecting a person named Gennaro Ciprio, C-I-P-R-I-O? Does that name mean anything to you? I take it from your silence that it does not." (T. 33a)

The Court duly admonished the jury (T. 61a):

> "If at anytime during the trial either by way of accidental exposure to any published news you feel that unprejudiced judgment has in anyway been impaired, you must consult with me immediately so that I can determine whether your capacity as a juror has been so affected as to make it necessary to excuse you."

The record shows that the Court stated to the Jury (T. 293a):

> "The indictment I read cannot be sent in because it has notations on it that would not be a matter for your concern, so I am getting a copy of the indictment without the notations and that will be sent into you."

After the deliberations of the jury began at 2:53 P.M., September 7th, 1972, the Foreman addressed a note to the Court, and at 3:50 P.M. it read as follows (Court T. ex. 2; T. 350a):

> "Jury Foreman requests a word with Judge. The annotated copy of the indictment was mistakenly sent into the Jury and the notes and inadmissible evidence were seen."

The "inadmissible evidence" referred to by the Jury Foreman was a notation appearing on a copy of the 20-page Illinois indictment (Def. Ex. A, T. 359a-379a) which had been sent into the jury room with a copy of the New York indictment inadvertently attached thereto, on the back of which were these written words (T. 296a-T. 297a):

> "Ciprio's murder inadmissible since prejudice obliterates its minor relevance and the jury might infer Mango had something to do with it, etc."

In Mangiamelli's absence, without his consent and knowledge the following took place:

At pp. T. 296a-297a the Court said:

> "At the outset of the trial Mr. Brackley requested and I granted that there should be no references either to Ciprio's death or murder and we want to eliminate that as a possible source or prejudice to the

> defendant. This statement unfortunately dilutes much of the care we took to keep it out of the case and I am willing to do two things, physically detach the New York indictment and say nothing to the Jury, or to attach a note to the Jury saying that the New York indictment should not have been attached to it and would they please disregard anything that may have been on it."

Mangiamelli's counsel moved for a mistrial by stating the following (T. 297a-298a):

> " * * * I must accept full responsibility for the error, if it is error, but it is the defendant who is on trial, not myself, and I would feel that the information may prejudice the jury to the point where they can't give him a fair trial and I would reluctantly ask for a mistrial. I certainly would not want that information before the jury and I would have no reason to put it before them other than through a mistake * * *."

In response the Court said (T. 298a):

> "I prefer to detach it and to give them a warning in writing. It may be they will acquit him and we won't have a problem."

The Court denied the mistrial without prejudice to renew it if and when a guilty verdict was returned.

Then without polling the jury or any further ado the Court permitted the jury to continue their deliberations. A new copy of Mangiamelli's exhibit was sent to

the jury with a note instructing them to disregard any of the notations on the previous exhibit.

After the return of the verdict of guilty the Court discharged the jury, but called the Jury Foreman into chambers. In the presence of both counsel, but without Mangiamelli's presence, knowledge or consent, the following took place:

> "The Court: Make a note that the attorneys are here. Mr. Goode, I thought I should detain you to ask you one or two quick questions about this note that you sent in. This is your note where you say, Jury Foreman requests a word with the Judge. The annotated copy of the indictment was mistakenly sent into the Jury and notes of inadmissible evidence were seen. I realize now that you must have been referring to the penciled notes on the back of that Chicago indictment, but actually the notes were not on the Chicago indictment but on the New York indictment which was attached to it. Can you tell me what those notes were that you say?
>
> The Foreman: There was a note in back of one of the sheets and the note read Ciprio murdered. This is the inadmissible evidence."
>
> "By the Court:
>
> Q. Did all the jury see that? A. Yes.
>
> Q. Then it became general knowledge? A. Yes.

Q. Later on I detached that part of the exhibit and wrote you a note directing you to disregard that. Did the jury receive that note? A. Yes.

Q. Was there any further discussion about those annotations? A. Well, we had taken previously a vote as to whether we thought this would bias our judgment, and we unanimously decided it would not. That was before we got your note and before we sent our note out.

The Court: Thank you very much."

ARGUMENT

POINT I

THE § 2255 APPLICATION BELOW SEEKS VINDICATION OF SERIOUS CONSTITUTIONAL INFRINGEMENTS NOT LITIGATED AND UNRESOLVED AT THE DIRECT APPELLATE LEVEL.

The § 2255 Court maintained in its opinion Order that Mangiamelli's collateral claims "are unquestionably mere recharacterizations of the point raised on appeal" (A. 5a) and "have already been determined adversely to petitioner and disentitle him to a collaterarily attack the same occurrences." (A. 5a) The Opinion-Order denying vacatur relied on Sanders v. United States, 373 U.S.1, 16 (1963); Kaufman v. United States, 394 U.S. 217, 227 m.8, 230 (1969); Thorton v. United States, 368 F.2d 822, 833 (D.C. Cir. 1966).

On March 1st, 1973, the United States Court of Appeals affirmed Mangiamelli's direct appeal in open Court without opinion. United States v. Mangiamelli, supra. We thus are unaware of the grounds upon which the Second Circuit affirmed the conviction. It is clear that Mangiamelli's Appellate brief to this Court in direct attack of his conviction raised in "PointVII "[3]

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3 Appellant's brief on Direct Appeal pp. 64-73; Docket No. 72-2307 (Second Circuit).

the matter of the prejudicial reference to the Ciprio murder inadvertently forwarded to the trial jury during the crucial stage of deliberations (A. 4a). However, in the § 2255 application Mangiamelli mounts a collateral attack which encompasses the inter-play of the (a) Trial Court's failure to take affirmative action with regard to making a proper determination of the prejudicial impact upon the jury by the receipt of information previously excluded, and excluding Mangiamelli at crucial stages of the proceeding; (b) The misconduct of the Jury Foreman, who first saw the annotation to the murder and passing the reference on to the rest of the jurors and then polling themselves as to possible prejudice; and (c) The ineffective assistance of defense counsel who failed during these events to properly protect Mangiamelli by insisting upon his presence and reviewing his application for a mistrial as the Court had urged him. It was the totality of these circumstances each inter-playing upon the others that at once differentiates Mangiamelli's points on direct appeal from his present § 2255 claims. To dismiss Mangiamelli's § 2255 application to relitigate old issues under new labels is an attempt to dismiss the

motion without reaching the merits. The interaction of Court, jury and defense counsel amounted to the substantial Constitutional deprivation now alleged.

So in Sanders v. United States, supra, pp. 1-2, upon which the § 2255 count relied petitioner was granted relief and a hearing on his second successive § 2255 motion, in view of the fact that a "denial of a prior application for relief under § 2255" or a direct appeal may be denied "only if (1) The same ground presented in the subsequent application was determined adversely on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." Thus, like in Habeas Corpus relief, in § 2255 motions the principle of res judicata does not apply absent the guidelines in Sanders, supra, or an abuse of the Writ or § 2255 application United States v. Hayman, 342 U.S. 205 (1951).

Once we determine that Mangiamelli in his § 2255 contentions satisfied the requirements of Sanders, supra, and represented claims not previously adjudicated, he was entitled to the relief requested unless his efforts "conclusively show" that there was no merit to his present

claim. Machibroda v. United States, 368 U.S. 487, 495 (1961). The reliance by the § 2255 Court on Kaufman v. United States, supra at p.227 n.8 citing with approval Thorton v. United States, supra at p.833, is not dispositive of the instant case in view of Machibroda, supra. There was no conclusive showing by the § 2255 Court that Mangiamelli's claims were not viable. It is noteworthy to note that while Kaufman, supra, permitted a collateral attack on a taint issue Mangiamelli in his present claim alleges among other things a failure of due process precisely on the issue of innocence or guilt.

In addition to the findings by the Court below of relitigation of old issues, the Opinion-Order attempts to apply the "harmless error" doctrine to Mangiamelli's allegations (A. 6a). In doing so the Court argues that the procedures followed by the Court were approved by "the implicit conclusion or appeal" and the procedures followed by the explicit approval of defense cousel" (A. 6a). The two-fold argument falls short on two grounds: One, the § 2255 issues raised were not urged in the within context on direct appeal; and two, it is precisely "the explicit approval of defense counsel" which forms the

basis of the allegation of the ineffectiveness issue. The Opinion-Order's reliance on United States v. Shor, 418 F.2d 26 (2nd Cir. 1969), appears to support Mangiamelli for in that decision the failure of the Court to answer notes in Open Court in the presence of defendant and his attorney was reversible error. As a matter of fact it appears clear that defense counsel in the absence of a defendant can never effectively consent to such procedures for answering a jury question. Evans v. United States, 284 F.2d 393 (6th Cir. 1960), United States v. Neal, 320 F.2d 533 (3rd Cir. 1963). Rule 43, F.R.C.P., requires the presence of the defendant and while Shor, supra, p.30, maintains that the harmless error rule embodied in Rule 52(a), F.R.C.P., is applicable, the presumption of prejudice has not been rebutted by the Government nor has the § 2255 Court made any such findings. Rice v. United States, 356 F.2d 709 (8th Cir. 1966).

POINT II

MANGIAMELLI WAS DENIED THE RIGHT TO BE PRESENT AT ALL STAGES OF THE TRIAL AND WAS FURTHERMORE DENIED THE RIGHT TO CONFRONTATION BY HIS INVOLUNTARY EXCLUSION FROM THE TRIAL PROCEEDINGS ON TWO CRUCIAL OCCASIONS. MOREOVER, BY HIS PHYSICAL EXCLUSION HE WAS PREVENTED FROM PARTICIPATING IN THE JUDICIAL INQUIRY RELATIVE TO THE JURY'S COMMUNICATION FOR SPECIAL INSTRUCTIONS ON AN UNAUTHORIZED AND HIGHLY PREJUDICIAL WRITTEN NOTATION MISTAKENLY GIVEN TO THEM AND READ AND DISCUSSED BY THEM DURING DELIBERATIONS. BY HIS EXCLUSION MANGIAMELLI WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

This is an unusual and unique case where a defendant was excluded without his knowledge or consent during two vital and crucial stages of the trial proceedings against him. The infringement amounted to a deprivation of a full spectrum of constitutional rights and encompassed three areas: counsel, court and jury. Defendant's counsel fully failed to demand his presence during these crucial periods of the trial proceedings; the Jury Foreman and the deliberating body mistakenly received during their deliberations highly prejudicial and inflamatory information, discussed it, and then arbitrarily decided

for themselves that no bias inured; finally, the Court failed to vindicate the serious grievance and to explain for the record the reason for the involuntary exclusion of the defendant Mangiamelli at the very moment his guilt or innocence was being decided.

At the first stage in Mangiamelli's absence, defense counsel on learning of the prejudicial information received by the trial jury moved for a mistrial which application was denied by the Court without prejudice to renew in the event of a guilty verdict (T. 298a).

At the second stage, again in Mangiamelli's absence, and after receiving the guilty verdict, the Court very briefly questioned the Jury Foreman and then excused the juror. Defense counsel asked no questions and failed to renew the application for the withdrawal of a juror (T. 334a-335a).

In the pre-verdict phase absent Mangiamelli, the Court actually instructed the jury in a written communication to disregard any notations on the previous exhibit submitted to them (T. 299a-300a). The extraordinary instruction to the jury was in answer to the Foreman's note stating, "Jury foreman requests a word with Judge.

The annotated copy of the indictment was mistakenly sent into the jury and the notes and inadmissible evidence were seen." (Court T. Exhibit 2; T. 350a). The Court's action was undertaken without polling the jury or safeguarding Mangiamelli's right to an unfettered and fair verdict. The jury was permitted to continue in their deliberations without ascertaining under judicial inquiry the impact of the inadmissible annotations received and deliberated upon.

Then, amazingly, after the verdict, the Court elicited from the Foreman additional facts that were not part of the Jury's original note. The Foreman indicated, "Well, we had taken previously a vote as to whether we thought this would bias our judgment, and we unanimously decided it would not. That was before we got your note and before we sent our note out."

In this setting we have the Foreman admitting that all the jurors were polled and unanimously decided that they believed no bias stemmed from reading and discussing amongst themselves the contents of the written notations in the deliberating room. Upon the Foreman's admissions the Court dismissed the matter and defense counsel re-

mained mute in Mangiamelli's absence.

The Sixth Amendment guarantees that, "On all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him." Pointer v. Texas, 380 U.S. 400 (1965). Mangiamelli's presence, unless waived by him, United States v. Torta, 464 F.2d 1202, 1208-1210 (2nd Cir. 1972); United States v. Clark, 475 F.2d 240, 246 (2nd Cir. 1973); United States v. Bell, 464 F.2d 667 (2nd Cir. 1972) is required when a jury is empanelled, see Hopt v. Utah, 110 U.S. 574, 579 (1884); Lewis v. United States, 146 U.S. 370 (1892); United States v. Crutcher, 405 F.2d 239, 242-244(2nd Cir. 1968); denied 394 U.S. 908 (1969), and in particular, as in Mangiamelli's case, when the Trial Judge gives additional instructions to the jury. Evans v. United States, 284 F.2d 393, 394 (6th Cir. 1960), cited with approval in Clark, supra, at p.246.

We contend paraphrasing Clark, supra, at pp.247-248. "Even if counsel intended to waive (Mangiamelli's) silence in absentia could certainly not be said to have amounted to an intentional relinquishment or abandonment of a known right, Johnson v. Zerbst, 304 U.S. 458, 464

(1939) by him, see United States v. Crutcher, supra, at Evans v. United States, 284 F.2d at 395." See also footnote 6 at p. 247.

Forwarding a letter to the jury as a Court direction and instruction in the hope that it will diminish or extinguish apparent prejudice, then later to briefly question the Foreman all in Mangiamelli's absence was error of Constitutional magnitude. Upon the facts that appear on the face of this record Mangiamelli should be granted a new trial in the interests of Justice. These proceedings themselves coupled and aggravated by Mangiamelli's absence and the ineffectiveness of defense counsel cannot be deemed harmless error. The Constitutional deprivation can only be redressed and vindicated by a vacatur of the Judgment and a new trial.

POINT III

THE JURY FOREMAN'S MISCONDUCT WAS SO FLAGRANT AND PREJUDICIAL IN CONTAMINATING THE REST OF THE JURORS BY SHOWING AND DISCUSSING WITH THEM THE PREJUDICIAL WRITTEN NOTATIONS THAT A NEW TRIAL IS NECESSITATED IN THE INTERESTS OF JUSTICE.

The conduct of the Jury Foreman in communicating the unauthorized written notations to the remaining jurors, discussing it with them and then usurping for himself the function of the Court in an effort to ascertain whether the information resulted in bias amounted to such substantial and flagrant prejudice effecting the issue of innocence or guilt that a guilty verdict should not be sanctioned under the circumstances.

In this critical area, the Court exclusively relied on its brief inquiry of a layman juror to make its determination that proper constitutional standards were maintained when the jury was polled in the deliberating room. Furthermore, absent serious judicial inquiry and supervision, it is expecting too much of human nature to believe that a juror would volunteer in the deliberating room in the sole presence of his fellow jurors that he was actually prejudiced, biased, influenced or

persuaded in his verdict by his acquaintance with the written notations to which he had mistakenly been exposed.

In view of the nature of the efforts throughout the trial by Court and counsel for both sides to shelter from the jury anything concerning the deceased Ciprio and the Court's own admonishment to the jury to immediately report at any time any communication received by them reference the trial which was not meant for them to hear or see, it cannot be seriously contended at this point that the information received by the trial jury was of harmless error which the Court could either ignore or treat lightly.

Judicial cognizance should be taken of the fact that the Foreman in reporting the incident in his original note by design failed to mention his own conduct which resulted in the remaining jurors reading and discussing amongst themselves the prejudicial written notations. Furthermore, the Foreman's note failed to mention the most crucial part of his conduct in questioning the jurors for any bias for which he was directly responsible.

The Foreman's conduct gravely effected the deliber-

ating process in its determination of guilt or innocence on legally competent evidence. Moreover, the damage done in the deliberating process was irreparable and the extent of the injury was precluded by the conduct of the Jury Foreman and the failure of the Court to make diligent judicial inquiry.

It is quite obvious that had the written notations which appeared in the exhibit submitted to the jury erroneously during deliberations would have been offered in evidence by the Government the Court would have barred its admissibility. Had the jurors been advised of the information contained in the notations by an outside source the jurors as recipients of that information would have violated the Court's admonishment and certainly adequate punishment would have been dispensed if the belated incident had not been reported to the Court.

We must distinguish the incident under consideration from that of a juror perchance merely reading a newspaper of some insignificant account concerning Ciprio's death. This is a matter where the Foreman upon reading the prejudicial notations was obligated

to call it to the Court's attention and instead of pursuing his mandated duty revealed first informed the remaining jurors, discussed it with them, and then attempted to cure the damage by asking his fellow members whether or not they had been prejudiced by the information he had no right to turn over to them in the first place.

Moreover, the impact of the written notations upon the jurors by the Foreman's misconduct is all the more telling because of the moment in which it was done. The prejudicial information came to the jury at a "critical juncture" in the trial proceedings principally because there are fewer opportunities to counteract prejudice at this stage than at any other.

However, "innocuous" the written notations may have appeared to the Government or to the Court from their respective vantage points after the harm had been done it apparently appeared otherwise to the jurors and Foreman who stated later, "We had taken previously a vote as to whether we thought this would bias our judgment and we unanimously decided it would not." Nonetheless, the prejudicial notations necessitated a note to

the Court indicating, "Jury foreman requests a word with Judge. The annotated copy of the indictment was mistakenly sent into the jury and the notes and inadmissible evidence were seen."

In United States v. Grady, 185 F.2d 273 (7th Cir. 1950), the Court reversed a conviction when the Judge discovered a verification had been attached to the information submitted to the jury during the course of deliberations. All the Seventh Circuit required was only evidence that the affidavit, "might have operated to the substantial in-jury of the defendant." See, also, Holmes v. United States, 284 F.2d 716 (4th Cir. 1960) and United States v. Kum Seng Seo, 300 F.2d 623 (3rd Cir. 1962) at p. 625.

In the instant case, the Court was not required to make a determination of potentially prejudicial exposure. There was direct proof to that effect in the very note of the Foreman and in his post-verdict admission. The facts are undisputed as to the Jury Foreman's misconduct bordering as it does on the unbelievable. Equally incredible is to legally sanction conduct of any juror who at his whim or caprice usurps the power and function

of the Court as was indeed done here by the Foreman during the course of deliberations. Such conduct mandates a new trial in the interests of justice.

POINT IV

MANGIAMELLI WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN HIS INVOLUNTARY ABSENCE ON TWO CRITICAL STAGES OF THE TRIAL PROCEEDINGS AT THE TIME OF THE JURY'S COMMUNICATION AND INQUIRY WITH THE COURT, MANDATING AN EVIDENTIARY HEARING AND/OR A NEW TRIAL.

In support of the claim of ineffective assistance of counsel the undisputed record plainly indicates that in Mangiamelli's absence, defense counsel moved on the one hand for a mistrial and then failed to pursue the application as the Court had suggested with leave to renew it in the event of an adverse verdict. We are not unmindful that we are in a cloudy area where trial strategy as a general rule lies solely within the discretion of trial counsel within certain limitations.

In this connection the United States Supreme Court in Henry v. Mississippi, 379 U.S. 443 (1965) and Brookhart v. Janis, 384 U.S. 1 (1966) have setforth notable guidelines. See, also, O'Conner v. Ohio, 385 U.S. 92 (1966) and compare with United States v. Clark, supra,

at pp. 247-248 and footnote G at p. 247.

The Henry doctrine contemplates that a binding waiver may ordinarily be made as long as the failure to assert the claim is predicated upon a belief that some benefit for the defendant would thereby be secured. Henry also noted that "exceptional circumstances" may preclude application of the "waiver by trial strategy" doctrine. In Brookhart, the Court found a situation in exceptional circumstances made it inappropriate for the attorney's trial strategy to bind the defendant without defendant's express approval.

A reading of Henry and Brookhart compels the determination Mangiamelli's situation possesses "exceptional circumstances" where the Court, the Government and trial counsel without Mangiamelli's presence continue with the trial. Later, in the post-verdict proceeding after the Jury Foreman's amazing admissions defense counsel fails to review the mistrial motion and pursue inquiry of the Foreman's misconduct. Defense counsel's silence in the post conviction setting deprived Mangiamelli of assistance of counsel when it was needed most.

Indeed, Mangiamelli had an absolute statutory and constitutional right to be present in and at all of the criminal proceedings against him and his counsel should have made some sort of a record or place the Court on notice to explain Mangiamelli's exclusion.

There is nothing in our record that even resembles the Court ever admonishing Mangiamelli for any improper conduct that would warrant his banishment from the trial. Counsel in this respect was ineffective in protecting his client Mangiamelli in this constitutional area.

The manner in which defense counsel represented Mangiamelli at these two trial junctions was a sham and a pretence of assistance of counsel. It was as if Mangiamelli had no counsel at all.

By the facts disclosed in the instant record due process requires a hearing to afford Mangiamelli an opportunity to come forward with his claim and proof which would warrant in the affirmative case a vacatur of his conviction.

POINT V

THE COURT DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY NOT APPLYING PROPER CONSTITUTIONAL STANDARDS IN RELATION TO (1) ITS FAILURE TO STATE A REASON ON THE RECORD AS TO WHY MANGIAMELLI WAS EXCLUDED FROM THE TRIAL PROCEEDINGS ON TWO OCCASIONS; AND (2) WITH RELATION TO THE MISCONDUCT OF THE FOREMAN AND THE CONTAMINATION OF THE REMAINING JURORS AFTER THE COURT BECAME AWARE THAT THE JURY DISCUSSED AMONGST THEMSELVES THE PREJUDICIAL WRITTEN NOTATIONS AND CONDUCTED SUBSEQUENTLY AN UNAUTHORIZED POLL TO DETERMINE BIAS DURING THE COURSE OF DELIBERATIONS.

This record clearly shows that Mangiamelli was excluded from participating and hearing certain relevant requests of defense counsel, Court rulings and the questioning of the Foreman juror in disposing of the Foreman's note to the Court which we have previously alluded to.

We have researched this particular issue and there is apparently no case in point on the subject matter. There are cases that indicate certain criteria that the Court must follow when (1) the accused is excluded from the Courtroom; and (2) when jurors see, read or hear prejudicial material.

In Illinois v. Allen, 397 U.S. 333 (1970), the United States Supreme Court stated that one of the most basic rights guaranteed by the confrontation clause of the Sixth Amendment is the accused's right to be present in the Courtroom at every stage of his trial. In Allen, the Supreme Court reversed the Circuit Court of Appeals 413 F.2d 232 (1969) for reversing Allen's conviction asserting that Allen brought on his banishment from the trial proceedings by his conduct. In Mangiamelli's situation, there is absent any action on his part that would warrant the Court to apply the Allen guidelines.

The law and cases cited in Allen, supra, Hopt v. Utah, 110 U.S. 574 (1884); Lewis v. United States, 146 U.S. 370 (1892); Shields v. United States, 372 U.S. 583 (1927); United States v. Torta, supra; United States v. Bell, supra; United States v. Clark, supra; United States v. Crutcher, supra and Evans v. United States, supra all point to the fact that Mangiamelli was denied due process and equal protection of law in his absence and by his absence.

The evidence against Mangiamelli was not of the nature that could be considered overwhelming. As a

matter of fact, the evidence actually stemmed from the weakest sources: co-conspirators and co-defendants who testified for the Government with undeviating intent to gain and bargain for lenient consideration in implicating Mangiamelli into their criminal activities. This evidence is always suspect and requires caution in its acceptance by a jury.

Upon this type of evidence it is true the jury after lengthy deliberations found Mangiamelli guilty but there is the lingering doubt that the Foreman's misconduct in contaminating the other jurors tilted the scales in favor of the Government and denied Mangiamelli a fair and impartial jury that he was entitled to as of right.

Two recent reported decisions from the Second Circuit casts no light on Mangiamelli's contentions but are worthy of note only because they deal with the limited degree of the amount of prejudice required for a reversal and that a reversal is mandated even when the Government's case is of an overwhelming nature.

In United States v. Rattenni, 480 F.2d 195 (2nd Cir. 1973) decided June 7th, 1973, reported in N.Y.L.J.

on June 21st, 1973, at p. 1 Col. 7-9, Judge Clark, the former Justice of the United States Supreme Court, in writing for the unanimous Court made at p. 5, Col. 1, the following interesting observation:

> "Any difference between Marshall and the present case on the basis of the number of jurors prejudiced is insignificant. The verdict must be set aside where even one juror in effect admits prejudice; after all, a defendant is entitled to twelve fair and impartial jurors. In requiring the re-trial of this Count (count one), we do not close our eyes to the weighty evidence presented against appellant which makes us reluctant to reverse. Nevertheless, the crucial importance of protecting the integrity of the trial process from such intrusions as occurred in this case mandates that we not permit the conviction to stand. We are further fortified in our decision by the knowledge that this disposition will not impose an undue on the Government if appellant is retried * * *"

In the second case, United States v. Burket, 480 F.2d 568 (2nd Cir. 1970) decided July 22nd, 1973, reported in N.Y.L.J. on August 22nd, 1973, on p. 1, Cols. 7, 8, Judge Friendly, in writing for the unanimous Court, said at p. 4, Cols. 6-7:

> "A sufficient answer to the attempt to secure reversal on this score might be

> that defense counsel was as responsible as the Prosecutor for seeing to it that only proper exhibits were sent to the jury room (see Rumely v. United States, 293 F.2d 532, 557-58 2nd Cir. cert. denied, 263 U.S. 713, 1923; United States v. Stassman, 241 F.2d 784, 786, 2nd Cir. 1957, Medina, J.; United States v. Yoppolo, 435 F.2d 625, 6th Cir. 1970; but see Osborne v. United States, 351 F.2d 111, 116, 8th Cir. 1965; contrast United States v. Adams, (385 F.2d 548, 2nd Cir. 1967), where defense counsel objected with vigor, but without success. Still we would not wish to affirm on this ground if we believed that Burket suffered substantial prejudice. But we do not. Judge Henderson had told the jury in the clearest terms that Santana was out of the case. While the jury had expressed its difficulty in distinguishing between Santana and Burket fingerprint exhibits, it had an opportunity to view the Burket prints in isolation after the Judge requested the jury to continue its deliberations. Since nothing was added to the evidence against Burket by the Certificate of Registration of the 1966 Buick, its presence in the jury room could hardly had any prejudicial impact."

In respect to the Court's failure to apply proper Constitutional standards in relation to the juror's misconduct we cite all the law and reasoning of United States ex rel Doggett v. Yeager, 472 F.2d 229 (3rd Cir. 1973) at pp. 236-239 and Kaufman v. United States, 394 U.S. 217 (1963) at pp. 226-228; see also, Townsend v.

Sain, 372 U.S. 293 (1963) at pp. 314-315 and Sanders v. United States, supra, and by these cases we buttress our claim that Mangiamelli is entitled to 2255 relief for an evidentiary hearing and a new trial.

In Doggett, supra, at pp. 236-239, clearly shows in an almost similar situation that Mangiamelli's Trial Judge failed to apply the applicable law when confronted with the Foreman's misconduct and the contamination of the entire jury panel whereat it was said:

> "The District Court, unfortunately, in its review of the state court record, applied the same legal standards as were applied by the Appellate Division. Those standards were inconsistent with the due process requirements of the fourteenth amendment.
>
> In effect, both the Appellate Division and the District Court imposed upon the defendant the burden of demonstrating that the newspaper accounts had actually prejudiced the jury against him. Prior to 1959 that may have been the law. See, e. g., Buchalter v. New York, 319 U.S. 427 63 S.Ct. 1129, 87 L. Ed. 1492 (1943); Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L. Ed 1021 (1910); Thiede v. Utah, 159 U.S. 510, 16 S.Ct. 62, 40 L. Ed. 237 (1895); Mattox v. United States, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892); Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171, 35 L. Ed. 968 (1891); Hopt v. Utah, 120 U.S. 430 7 S.Ct. 614, 30 L. Ed. 708 (1887); Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1878). Beginning

in 1951, however, with Justice Jackson's concurring opinion, joined in by Justice Frankfurter, in the per curiam reversal in Shepherd v. Florida, 341 U.S. 50, 71 S.Ct. 549, 95 L. Ed. 740 (1951), the Supreme Court began the evolution of a more reasonable due process standard for judging the effect of extrajudicial influences on a jury. In Stroble v. California, 343 U.S. 181, 198, 72 S.Ct. 599, 96 L. Ed. 872 (1952), what was concurrence in Shepherd became for Justice Frankfurter dissent from the affirmance by the majority of a decision by the Supreme Court of California announcing a standard of review as to the effect of prejudicial newspaper publicity essentially the same as that applied by the New Jersey courts in this case. Justice Frankfurter dissented not only from the ruling which placed on the appellant the burden of demonstrating that the prejudicial material had influenced the result, but also from the Court's toleration of the role of a court officer, the prosecutor, in encouraging dissemination. See also Leviton v. United States, 343 U.S. 946, 72 S.Ct. 860, 96 L. Ed. 1350 (1952) (memorandum of Justice Frankfurter on the denial of certiorari). In 1959 came Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L. Ed. 2d 1250 (1959) (per curiam).

In a departure from its prior rulings the Court granted a new trial despite the statement of the jurors that they would not be influenced by the news articles, that they could decide the case only on the evidence offered and that the articles had engendered no prejudice against the defendant. The case involved two newspaper reports during the trial which contained information of prior convictions of the

defendant and his wife. In Marshall, contrasted with this case, the examination of the jurors had been conducted separately out of the presence of their fellow panelists. Each of the seven jurors who had seen one or more of the news articles assured the court that he would disregard it in his deliberations. The Court reversed the denial of a motion for a mistrial, saying:

'We have here the exposure of jurors to information of character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. 360 U.S. at 312-313, 79 S.Ct. at 1173.'

Prior to 1959 the Supreme Court had applied the same standard in prejudicial publicity cases whether the case arose in a federal or in a state court. Marshall v. United States, supra, while factually controlling in this case, is distinguishable on the ground that it involved the Supreme Court's supervisory power over a lower federal court rather than its constitutional power to enforce fourteenth amendment due process standards. But soon after 1959 it became clear that the former rule was no longer applicable in state trials. In Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L. Ed. 2d 751 (1961) a state habeas corpus case, the court noted that newspaper publicity had resulted in a pattern of deep and bitter prejudice in the community where the trial was held. It reaffirmed the view announced in Marshall that prejudicial infection is not cured by

the statement of a juror that he will not be influenced by adverse publicity. It also disapproved of conducting an examination to determine prejudice in the presence of the other veniremen. The Court stated:

'No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. 366 U.S. at 728, 81 S.Ct at 1645.'

There can be no doubt that Irvin v. Dowd, supra, was intended as a change in the prior rule, for instead of citing the older cases set forth hereinabove, it cited with approval the concurring opinion of Justice Jackson, in which Justice Frankfurter had joined, in Shepherd v. Florida, supra."

CONCLUSION

Upon all the facts and law set forth in the 2255 Motion and the trial proceedings, we move this Court for a fact hearing and/or a new trial in the interests of Justice.

Respectfully submitted,

FRANK A. LOPEZ
Attorney For Appellant
Salvatore Mangiamelli

AFFIDAVIT OF SERVICE

Re: 74-1467
Mangiamelli v. U.S.A.

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Petitioner-Appellant.

That on the 16th day of May , 1974, I served the within Brief for Appellant in the matter of

Salvatore Mangiamelli v. United States of America ,

upon Paul J. Curran, Esq., U.S. Attorney for Southern District
Foley Square, New York, New York 10007 ,

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Mu riel Mayer

Sworn to and subscribed
before me this 16th day
of May 1974.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977.